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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 562

LOCAL 36, INTERNATIONAL FISHERMEN AND ALLIED WORKERS OF AMERICA, JEFF KIBRE, GILBERT ZAFRAN, CLIFFORD C. KENNISON, F. R. SMITH, GEORGE KNOWLTON, OTIS W. SAWYER, W. B. MCCOMAS, HARRY A. MCKITTRICK, ARTHUR D. HILL, C. LLOYD MUNSON, CHARLES MCLAUCHLAN, ROBERT M. PHELPS, BURT D. LACKYARD, AND RAY J. MORKOWSKI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 2589) is reported at 177 F. 2d 320. The opinion of the District Court for the Southern District of California on the motions to dismiss the

indictment and strike the jury panel (R. 25, 2523) is reported at 70 F. Supp. 782.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1949 (R. 2641) and a timely petition for rehearing was denied on November 29, 1949 (R. 2643). On December 22, 1949, the time within which to file a petition for writ of certiorari was extended by the Chief Justice to and including January 27, 1950 (R. 2653). The petition was filed on January 27, 1950. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED

1. Whether it is a violation of Section 1 of the Sherman Act for fishermen operating in commerce to agree to fix the prices at which they will sell their fish and to prevent their customers from receiving fish unless they agree to the prices fixed.

2. Whether the above conduct is exempted from the Sherman Act by the Clayton Act, the Norris-La Guardia Act, the Capper-Volstead Act or the Fishermen's Marketing Act.

3. Whether the methods of selecting the jury panels used in this case systematically and intentionally excluded any eligible group or segment of the community.

STATUTES INVOLVED

Section 1 of Act of July 2, 1890, 26 Stat. 209, as amended by the Act of August 17, 1937, 50 Stat. 693, 15 U.S.C. 1, commonly known as the Sherman Act provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal * * *.

Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 17, provides:

> That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 1 of the Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. 101, provides as follows:

> That no court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out

> of a labor dispute, except in a strict conformity with the provisions of this Act; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this Act.

Section 1 of the Fishermen's Marketing Act (Act of June 25, 1934), 48 Stat. 1213, 15 U.S.C. 521, provides in part:

> That persons engaged in the fishery industry, as fishermen, catching, collecting, or cultivating aquatic products, or as planters of aquatic products on public or private beds, may act together in associations, corporate or otherwise, with or without capital stock, in collectively catching, producing, preparing for market, processing, handling, and marketing in interstate and foreign commerce, such products of said persons so engaged.

STATEMENT

Petitioners are Local 36 of the International Fishermen and Allied Workers of America, and 14 officers and members of the Local. They were convicted by a jury of violating Section 1 of the Sherman Act and sentenced to pay fines ranging from $10 to $3,000 (R. 100). The judgments of conviction were unanimously affirmed by the court of appeals (R. 2641).

I

The indictment charged that beginning some time prior to May 1946 and continuing up until the in-

dictment was returned on August 23, 1946, petitioners engaged in a combination and conspiracy to fix prices for the sale to dealers of fresh fish caught in the ocean off of the coasts of Southern California and Western Mexico and to prevent dealers who did not agree to the prices fixed from obtaining, selling, or shipping any fresh fish or crustaceans (R. 2, 3, 8, 13). The sufficiency of the evidence to support the verdicts is not challenged by petitioners, and that evidence may, for present purposes, be briefly summarized as follows:

Some 20 million pounds of fresh fish are caught annually in the fishing area involved and sold to fresh fish dealers in the area. Over a million pounds of fresh fish are shipped to the dealers from Oregon and Washington each year. (Gov. Exs. 34, 35, R. 842.) The fishermen members of petitioner Local 36 generally fish in boats owned by themselves or other fishermen. Over half the fishermen have listed themselves boat owners or as self-employed in applying for membership in the Association. The fishermen are not compensated by the fish dealers during the period they are out fishing, nor are they subject to any control by the dealers with respect to when and where they fish. The fish caught are sold to the dealers on the basis of individual bargains made when the catch is brought in. In most cases the fishermen have no arrangements with any dealer to buy their catch at the time they go out to fish. When a boat has more than one fish-

erman, the proceeds of the sale of a catch are divided in shares, the fisherman who owns the boat and gear being allocated an extra share to pay for wear and tear on the equipment. (R. 137-8, 279, 370-1, 440, 453, 472, 485, 513, 1370, 1474, 1769.)

In April 1946 it was agreed at a meeting of the Association that a contract (Indictment, Ex. A, R. 14) establishing the minimum prices to be charged the fish dealers for fresh fish and crustaceans should be entered into between the various locals of the Association in Southern California and the fresh fish dealers (Gov. Ex. 201, R. 1115).[1] The proposed contract involved no change in the practice of individual sales of fish by fishermen to dealers, but it set uniform prices for such sales.[2] The contract was submitted to the San Pedro dealers in May 1946, and they were told that unless they signed the contract they would be prevented from receiving fish from

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[1] The plan of action of the Association is set forth in a letter written by petitioner Zafran on May 17, 1946 (Gov. Ex. 203, R. 1115):

> As you may know we are preparing to present a Southern California minimum price contract ranging from Santa Barbara to San Diego.
>
> On Monday, May 20, 1946 a contract will be presented to each dealer in this area. The committees will personally present the contract in San Pedro, Newport and Santa Monica simultaneously. They will be given forty-eight (48) hours to sign. If the contracts are not signed by 7:00 A.M. Wednesday we will establish picket lines and stop all fishing for fresh fish in Southern California. We have then given the dealers to June 1, 1946 to sign, or after that time we will endeavor to stop the flow of all northern fish into this area as well.

[2] The initial price minimums were generally to be the OPA ceiling prices then in force (Par. 4(C), R. 16-17).

any source (R. 166, 437). Finally, on May 27, the dealers were informed that if a minimum price agreement was not signed by May 28, "that no fish of any kind will be brought into San Pedro, starting 7:00 a.m." on May 29 (Gov. Ex. 236, R. 1124). None of the San Pedro dealers signed the contract, and from June 1 until the early part of July the members of Local 36 ceased delivering fish to the San Pedro dealers (R. 317).

In addition to their refusal to deliver fish themselves, Local 36 and its members engaged in various activities directed toward cutting off the supply of fresh fish received by the non-signing fish dealers from any other sources. These included: (1) picketing the fresh fish dealers (R. 161-4); (2) requiring non-member fishermen to obtain clearance cards from Local 36 before going fishing (R. 468-9);[3] (3) seeking to prevent ice deliveries to fishing boats not possessing clearance cards (Gov. Ex. 214, R. 1120); (4) seeking to make it impractical for the dealers to receive fish at their markets by preventing ice deliveries at the markets (R. 558); (5) seeking to prevent the Railway Express Agency from delivering fish to the dealers by threats to picket the Railway Express Agency's San Pedro office (R. 574); and (6) threatening the driver of a

[3] These cards were issued only to fishermen who would participate in the picketing of the dealers or pay for the hiring of substitutes (R. 468-9, 478, Gov. Ex. 227, R. 1122). And such fishermen were instructed not to sell their fish to non-signing dealers (R. 446, 504).

Los Angeles-Seattle Motor Express Company truck attempting to deliver fish to a picketed dealer that if he tried to transfer the fish to one of the dealer's trucks out on the highway, the pickets would "destroy the fish, or knock it off the truck or something" (R. 878-9).

II

Petitioners challenged the impartiality of the selection of the jury panels from which the grand jury that indicted them, and the petit jury that tried them, were drawn. Both courts below have rejected these challenges (R. 2573, 2640) but petitioners persist in them here (Pet. 77). Accordingly, it is necessary briefly to describe the methods by which the jury lists were made up.

The two basic sources of names for jury service were (1) a file in the clerk's office listing about twenty-five or thirty thousand persons referred to as "available" because they had served on juries at times more than two years past, or had been found presumptively qualified for jury service (R. 1996-97, 2072, 2096), and (2) lists of names furnished by the jury commissioner from time to time (R. 1986-7). Questionnaires were sent to the persons on the commissioner's lists and to persons selected at random from the clerk's file (R. 2036-38, 2552). From the list of persons who answered questionnaires,[4] the clerk eliminated the names of those

[4] More than two-thirds of the questionnaires were not answered (R. 2114).

whose answers showed obvious statutory disqualification by reason of age, non-citizenship, change or duration of residence, or illiteracy (R. 2082-85, 2552). The remaining names were placed in a box from which the commissioner and the clerk drew names (R. 1969-70). The persons whose names were drawn were summoned for jury service (R. 1971). Of these, an undetermined number were eliminated by the court for disqualification or exemption under the California law or the federal statutes, or merely excused (R. 1972, 1993). Juries were selected from the persons remaining.

As to the great bulk of the names furnishing the sources of jury lists no specific evidence was adduced. It appears that the greater portion of the names was originally furnished by the jury commissioner over a period of years from diverse sources (R. 2071).[5] A smaller number of names were obtained by the clerk, also from various sources (*ibid.*).[6] Complete information as to the sources of names furnished by the jury commissioner was available only as to 6712 names fur-

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[5] The sources included the following: the Los Angeles telephone book (R. 2171), a comparatively small number from the Southwest Blue Book, a social register (R. 2129, 2158), various clubs (R. 2124, 2126), a list of bank employees (R. 2494), Railroad brotherhoods (R. 2130), the Congress of Parents and Teachers (R. 2144), a list from a Negro minister (R. 2150-1), and personal property assessment lists (R. 2150).

[6] These included a list of names of Negroes collected by a deputy clerk from undetermined sources (R. 2067-8), and another of Chinese-Americans compiled from naturalization records (R. 2070).

nished from 1943 to the time of the trial in 1947. As to these, 1680, or about 25%, came from a publication called the *Southwest Blue Book,* which purports to be a social register; 154 names, or 2%, came from two women's clubs and the Congress of Parents and Teachers; and the remaining 4878, or 73%, were taken from the telephone directory, except for an undetermined number taken from a list of automobile owners (R. 2122-49, 2549).

At no time has there been elimination by the clerk or jury commissioner of any prospective juror because he was a day laborer, a member of a labor union, or a Negro (R. 2088-9). Both the commissioner and the clerk testified that there was no intentional discrimination by them against any group, occupation or race in the selection of the names for the jury lists (R. 2172, 2094-5).

The petitioners called as a witness a statistician retained to make an occupational survey of the jury panels selected in 1946 and 1947 up to the time of the trial (R. 2226). He testified that the occupational distribution of the panels was different from that of the entire population, and that statistical theory indicates that the mathematical probability of the selection of such a panel from the entire population by a purely random method is remote (R. 2300-23). Petitioners, however, did not attempt to show how much of the alleged non-representative character of the panels was due to the

nature of the lists from which the panels were drawn and how much due to the intermediate steps in the process of jury selection.[7]

The petitioners' expert also testified that the sources used by the jury commissioner in obtaining names were not representative of the entire community (R. 2366-86), and discussed the relative merit of various available sources of names (R. 2223-5). Stating that no source of names was complete (and therefore completely unbiased in the statistical sense), he said that the list of registered voters in the county was the best source of names available (R. 2223), and that the listings in a telephone directory are biased (R. 2340). The voters registered totalled 1,277,418, after deducting 583,627 who had failed to vote, and the population of the county was estimated to be 3,747,962 (R. 2253). The witness estimated, based on the 1940 Census, that 27.6% of the population is under 21 years of age (R. 2337-9). Applying this estimate to the recent population estimate, the approximate number of persons in the county over 21 years of age was in excess of 2,700,000. Thus, the approximate part of the presumptively eligible population appearing in the most recent registry of voters was

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[7] The petitioners' witness did testify that certain groups of persons are more likely to answer questionnaires than others. This asserted tendency, however, was said to follow a special classification of occupations rather than economic levels (R. 2391-2401).

48%; using a previous registry of voters, 66% of the population appeared (R. 2459-60). Although petitioners' witness was unable to say whether this register would present a fair cross-section of the community, stating that the matter would have to be determined empirically, he nevertheless maintained that it was, for statistical purposes, superior to other available sources (R. 2460).

The trial court found as a fact that the system of jury selection used did not result in exclusion of prospective jurors on the basis of economic status, occupation, race, religion or sex (R. 2573).

ARGUMENT

1. Although the argument is not spelled out with precision, petitioners apparently contend that the original Sherman Act was not intended to and does not apply to fishermen who combine to fix the prices for their catch, because they are "working original producers" (Pet. 42-5). Thus petitioners would renew the traditional attack upon *Loewe* v. *Lawlor,* 208 U. S. 274, which definitively rejected the argument that the Sherman Act exempts labor or any other group when the activities of that group operate to restrain interstate commerce. In *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 487, the Court took occasion again to reject the challenge to *Loewe* v. *Lawlor,* pointing out that during the thirty-two years the decision had stood Congress had not seen

fit to change the law to extend a blanket exemption to labor.[8]

Apart from the effect of subsequent statutes (discussed *infra*) which assertedly exempt petitioners from the Sherman Act, there can be no question but that the activities charged in the indictment violated the basic Act. Petitioners were charged with conspiring to "fix, determine, establish, and maintain arbitrary, artificial and non-competitive prices for the sale to dealers of fresh fish * * * and to prevent dealers who do not agree to pay said prices from obtaining, selling or shipping any fresh fish or crustaceans" (Indictment, R. 8). It is settled law that a combination to fix the price of goods in interstate commerce constitutes an unreasonable restraint of trade *per se*.[9] And the particular acts proved (*supra*, pp. 6-8) show beyond doubt that the petitioners combined to coerce the fish dealers to agree to the prices fixed by prevent-

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[8] It is true that in the *Apex* case the indirect impact of labor's collective bargaining process on interstate commerce was held to be without the scope of the Sherman Act. Here, however, the "collective bargaining" concerns not the wages of labor but the price of fish. And as *Apex* makes clear, agreements which impair competition among sellers of goods constitute one of the principal evils at which the Sherman Act was aimed. See 310 U. S. at 497-8.

[9] *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 290; *United States* v. *Joint Traffic Association*, 171 U. S. 505; *United States* v. *Trenton Potteries*, 273 U. S. 392; *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U. S. 427; *United States* v. *Socony-Vacuum Oil Company*, 310 U. S. 150; *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 535-536; *United States* v. *Line Material Co.*, 333 U. S. 287; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131, 143.

ing them from receiving fish unless they would sign the contracts presented to them by petitioners.

Petitioners have contended (Pet. 64-9) that the peculiar economic conditions existing in the fishing industry justify an exception being made in the application of the *per se* rule here. They argue that the rule should not apply to the efforts of fishermen to fix the prices paid for fish caught by them, and assign as error the exclusion of evidence as to the economic conditions of fishermen (Pet. 64). These arguments are in effect aimed at the *per se* rule itself. That rule rests on the premise that *any* fixing of prices is unreasonable without regard to the particular circumstances relied upon to justify it. As this Court pointed out in *United States* v. *Trenton Potteries*, 273 U. S. 392, 397-8:

> The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

The trial court properly excluded the proffered evidence of the conditions in the industry and properly instructed the jury that the reasonableness or unreasonableness of the prices fixed by the agreement was immaterial (R. 1940).

2. Petitioners next argue (Pet. 41-63) that, whatever the correct interpretation of the original Sherman Act, their activities here are exempted from it by one or more of the following statutes: Section 6 of the Clayton Act, 38 Stat. 731, 15 U.S.C. 17, the Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. 105, the Capper-Volstead Act, 42 Stat. 388, 7 U.S.C. 291 or the Fishermen's Marketing Act, 48 Stat. 1213, 15 U.S.C. 521. None of these statutes, however, justifies petitioners' reliance upon it.

a. *The Clayton and Norris-La Guardia Acts*

No serious contention can be made that petitioners' activities fall within the ambit of the Norris-La Guardia Act (*supra*, pp. 3-4) since this Court held squarely to the contrary in a case on all fours with the instant case. In *Columbia River Packers Association* v. *Hinton*, 315 U. S. 143, it was held that fishermen who furnish their own boats, fish where and when they please, and sell their catch to whomever they please are not in an employer-employee relationship with their fish dealer customers.[10] Ac-

[10] The Court said (315 U. S. at 145): "That a dispute among businessmen over the terms of a contract for the sale of fish is something different from a 'controversy concerning terms

cordingly, it held the Norris-La Guardia Act inapplicable to prohibit an injunction restraining such fishermen from violating the Sherman Act. It is plain that the fishermen in the instant case occupy the same relationship to the fish dealers here (*supra*, pp. 5-6).[11]

It is equally clear that Section 6 of the Clayton Act (*supra*, p. 3) is of itself of no aid to petitioners. Even if it be assumed for the purpose of discussion that the Association could for some purposes be regarded as a "labor organization" within the meaning of Section 6, that would not legalize the activities charged and proved against the petitioners here. Petitioners have combined to fix the price of goods in commerce and to prevent their customers from purchasing elsewhere unless they submit to petitioners' terms.

As is made clear by *Apex Hosiery Co.* v. *Leader*, *supra*, even a bona fide labor union loses the protection of the Clayton Act where the purpose and effect of its activities is to "monopolize the supply,

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or conditions of employment, or concerning the association * * * of persons * * * seeking to arrange terms or conditions of employment' calls for no extended discussion." And see *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 463-4, holding that even where labor is a principal factor in one's cost of production, he may nevertheless be an *entrepreneur*.

[11] Although it would have been justified, on the basis of the *Hinton* case, in excluding from the jury the question whether there was an employment relationship the trial court submitted the question to the jury as one of fact (R. 1939, 1944).

control * * * price or discriminate between its would-be purchasers" (310 U. S. at 512).

Since petitioners can rest on neither Act alone, they advance the curious contention that, although the Norris-La Guardia Act would not be applicable here under any circumstances because of the lack of an employment relationship between the petitioners and the fish dealers, it nevertheless in some obscure way has the effect of broadening the Clayton Act to embrace within its protection this association of independent businessmen who sell fish. This novel argument finds no support in *United States* v. *Hutcheson,* 312 U. S. 219, which holds that acts which the Norris-La Guardia Act puts beyond the reach of injunction are likewise beyond the reach of criminal prosecution under the antitrust laws. The doctrine here urged by petitioners is, in effect, that acts which the Norris-La Guardia Act does not put beyond the reach of injunction are nevertheless put beyond the reach of criminal prosecution.

The trial court fully and correctly instructed the jury as to the application of Section 6 of the Clayton Act (R. 1943-5), and it properly instructed that conviction would be proper if the jury should find that the fishermen were independent businessmen who conspired to fix prices and prevent fish dealers from buying from other sources (R. 1939). The various instructions embodying petitioners' erroneous interpretation of the Clayton Act were correctly refused.

b. *The Capper-Volstead Act and Fishermen's Marketing Act.*

Petitioners also seek to uphold their activities under the Fishermen's Marketing Act read in the light of the Capper-Volstead Act after which it was patterned. Concisely stated, petitioners' position is that the contract proposed by them to the fish dealers (R. 14) was a proper device for the collective marketing of the fish caught by the members of the Association, and that collective marketing is expressly permitted by Section 1 of the Fishermen's Marketing Act (*supra,* p. 4) (Pet. 58-63). The coercive methods which were used by the petitioners to compel fish dealers to sign the contract are contended to be beyond the reach of the Sherman Act because their objective is legal (Pet. 70-76).

The correctness of the first of these contentions may be conceded, *arguendo.*[12] Indeed, the trial court's instructions to the jury are entirely consistent with this contention (R. 1940-2). But the second contention—that, assuming petitioners might lawfully combine for cooperative marketing, their activities directed toward imposing a collective marketing agreement upon their customers do not violate the Sherman Act—is wholly fallacious. The argument rests on an analogy to cases

[12] As the court below pointed out, it is unnecessary to consider the validity under the Sherman Act of the proposed contract standing alone (R. 2595).

involving the collective bargaining activities of labor. Thus *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, held that lawless local activities of labor directed at procuring a lawful agreement involving terms of employment did not violate the Sherman Act even though the indirect effect was a restraint on commerce. The rationale of that case is based upon the common law origins of the restraint of trade principles which underlie the Sherman Act. The Court concluded that restraints resulting from the activities of labor with respect to conditions of employment were not encompassed by the Act.

The subject matter here is quite different. There is a fundamental difference between restraints of trade resulting from the efforts of a labor organization to gain advantageous conditions of employment, and restraints imposed by an organization of sellers in an effort to control the prices and conditions upon which they will agree to sell. The former do not involve restraints of the kind which the Sherman Act is designed to prohibit. *Apex Hosiery Co.* v. *Leader, supra.* The latter show a purpose and plan to restrain the relationship between buyer and seller. The fact that the members of the organization plan to enter perfectly legal contracts of sale, for which they might negotiate collectively, does not justify a scheme designed to prevent prospective customers from dealing with competitors, indeed, to prevent customers from being able to buy anywhere unless they surrender

to the terms being forced upon them. Cf. *International Salt Co.* v. *United States,* 332 U. S. 392.

The trial court's instructions based on the Fishermen's Marketing Act correctly reflect the law applicable to the facts presented by this record. The court read to the jury the applicable portions of the Act (R. 1940-41) and then drew a distinction between contracts arrived at through voluntary collective marketing which are permissible, and contracts arrived at by coercion which are unlawful (R. 1942). Like the limited exemptions accorded to labor and farmers (cf. *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797; *United States* v. *Borden Co.,* 308 U. S. 188) the Fishermen's Marketing Act is not a general license to restrain trade. *Cf. Hinton* v. *Columbia River Packers Ass'n,* 131 F. 2d 88 (C. A. 9).

As there is no conflict of decisions, and the instructions to the jury correctly stated the law, there is no occasion for review by this Court.

3. In attacking the method of selecting grand and petit jurors here used, petitioners advance two arguments. First, they contend that the sources of names used had an inherent tendency to underrepresent certain economic groups within the community. Second, they contend that the composition of the resulting jury panels demonstrates that the sources used did not include a proper cross-section of the community. We think that the courts below properly held that petitioners failed to sus-

tain the burden of showing the kind of intentional and systematic exclusion of particular groups or classes which has been condemned by the cases.

The cases relied upon by petitioners hold that a jury panel is defective if there is a systematic and intentional exclusion of a particular economic class, racial group, or other defined segment of the population. This is not such a case. There was here no deliberate and systematic exclusion of a certain group in the community, like that in *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217 and *Ballard* v. *United States*, 329 U. S. 187. Neither is this a case in which persons selected from a particular classification of those eligible were taken from a sub-classification of that group, like *Glasser* v. *United States*, 315 U. S. 60, 83. It is not a case where the results of the selection and the procedures used combine to show a system designed to accomplish a virtual exclusion of a clearly defined group within the community, like *Smith* v. *Texas*, 311 U. S. 128 (involving the application of the Fourteenth Amendment; compare *Fay* v. *New York*, 332 U. S. 261).

Evidence was introduced of the compilation of lists of names furnished to the clerk for the past four years, a total of 6712 names (*supra*, pp. 9-10). But the great mass of persons available for jury service were listed in a file of some 25,000 or more names accumulated since about 1925 (*supra*, p. 8). No data as to the exact sources of the names used could be obtained. At most, the evidence indicates

that the file of 25,000 "available" names was made up from sources roughly similar to those used in recent years (R. 2159-2160).

The conduct of the clerk and jury commissioner, far from showing systematic and intentional exclusion of particular groups or parts of the population, shows rather an utter lack of system as to use of particular classes or groups.[13] It is significant that the largest single source of names in recent years, the telephone directory, gives no information whatever as to race or economic status, and only the flimsiest of clues as to religion and national origin.[14] True, petitioners' expert testified that telephone directories do not list a statistically perfect cross-section of the community (R. 2340). It is obvious that telephone directories included only those who are able to pay for telephone service; there can be no claim, however, that such directories do not list, in substantial numbers, relatively poor persons, day laborers, members of labor unions, members of racial minorities, and other groups. The witness merely testified as to the rela-

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[13] In this connection see particularly R. 1996-2000, 2036-38, R. 2137-48.

[14] The *Southwest Blue Book*, the use of which is particularly challenged by petitioners, also gives very little information about those listed therein. Although an attempt was made (R. 2367-86), petitioners failed to establish the economic and social standards for listing in this publication. Of course, we do not contend that this book lists an accurate cross-section of the community. However, from the thousands of persons listed, it is obvious that listing is not confined to the *corps d' elite* of California society (Def. Ex. U, R. 2156).

tive merit of the various available sources of names (R. 2223-5). No source gives a complete representation, nor does any approach perfection; a list of registered voters was the expert's choice as the best available source, but he conceded that 40% of the persons eligible do not register (R. 2225).

In their attack upon the selection of names from which jurors were drawn, the petitioners rely heavily upon an analysis of the composition of the actual panels and of the actual juries.[15] This analysis is relevant only insofar as it reflects the composition of the original lists,[16] since petitioners had no right that the particular jury which tried them be representative of the population. *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220. In the argument based on this analysis, petitioners ignore the possible effects of the intermediate steps in the process of jury selection. First, only those persons who answered questionnaires mailed to them were considered for jury duty (R. 2102). Second, the

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[15] The District Judge made his own classification of the occupations listed by members of the panel, and differed considerably with the expert's conclusions. He thought a much greater proportion of the panel came from "lower" occupational categories—probable union members, employees rather than employers, petty tradesmen and clerks, skilled and unskilled labor, etc. (R. 2555-65).

[16] No direct evidence was adduced as to the occupational classification of persons named on the original lists of the jury commissioner and on the great mass of cards in the available file, since this information was not shown except on some of the older cards in the available file. The petitioners' expert testified only as to the inferences of occupational bias to be drawn from the evidence of the sources of names.

clerk of the court eliminated those whose answers to the questionnaire showed obvious disqualification or exemption (R. 2082-87). Third, the court eliminated all others found to be disqualified or exempt by statute, or who, in the judgment of the court, showed sufficient excuse (R. 1972-3).[17]

Each of these steps might distort the jury panel from that perfect cross-section of the population demanded by petitioners. The petitioners neither urge error in this intermediate process nor offer to explain the statistical effects of it, yet they offer the composition of the final panels as conclusive proof of purposeful underrepresentation of certain groups in the original lists.[18] The testimony of

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[17] The possible effects of clearly valid requirements for eligibility (literacy in English, citizenship, age and property) are commented upon in *Fay* v. *New York, supra*, p. 276, 277. The disposition of judges to excuse wage earners who aver that jury service will cause financial hardship is familiar to this Court. *Thiel* v. *Southern Pacific Co., supra*, majority opinion, p. 222; dissent, pp. 231-232.

[18] In this regard it is interesting to note that even when an intensive effort is made to secure a cross-section of the community in the original selection of names, the jury panels may still show a pattern of representation like that attacked in this case. When the *Thiel* case was tried anew, the composition of the panels and the method of selection were again attacked. It appears from the opinions that certain groups of the population were not represented on the lists and panels in the same proportion as in the population. *Thiel* v. *Southern Pacific Co.*, 67 F. Supp. 934 (N.D. Calif.), affirmed, 169 F. 2d 30 (C.A. 9), certiorari denied, 335 U. S. 872. Concurring in the court of appeals, Judge Healy said (169 F. 2d at 32):

> It is probably open to debate whether the practice squares in all respects with the the views expressed by the [Supreme] Court in the opinion reversing the earlier judgment. * * * Obviously any method devised in an effort to obtain a fairly representative group of jurors will

petitioners' expert that the composition of the final panels was such that they could not possibly have been drawn from a representative list rests upon the unspoken and unsound premise that the intermediate and unchallenged steps in the process of selection did not change the relative composition of the group.

Even if petitioners' statistical analysis be accepted,[19] there is no showing that the method used, though admittedly less than perfect, amounts to any systematic exclusion of particular groups or classes. However unscientific the commissioner's method of obtaining names, the record is barren of evidence that his actions were actuated by a desire to exclude or underrepresent any particular segment of the population.[20] And the trial judge

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be open to criticism, for it is not possible even to approximate perfection along this line. Persons qualified and available for jury service do not readily yield to classification in a society so fluid as ours. They cannot be neatly pigeonholed like specimens of rock or mineral.

[19] As the district court demonstrated, there is grave doubt as to the usefulness of an analysis of occupations based upon the census (R. 2543-5). The same conclusion was reached in *United States* v. *Foster*, 83 F. Supp. 197, 202 (S.D. N.Y.).

[20] It must be noted that this jury commissioner's compensation was $15.00 per year, and that he was furnished no clerical assistance whatever. (R. 2142, 2171.) By comparison, the system used by the local state courts required one-half of the time of an officer of the court, the full-time services of one secretary, and half-time services of ten other persons (R. 2198-9). The cost of obtaining 4,000 names for prospective jury service was estimated to be $9,172.50 (R. 2196). It was testified that a list of registered voters, which was recommended by petitioners as a source of jury lists, was furnished to the state courts free and would probably cost the Federal jury commissioner $930.58 (R. 2484-86).

explicitly found that no such motives existed (R. 2573).

Obviously there are almost infinite possibilities of variation between a method of jury selection which excludes all members of a substantial group of the persons eligible for jury service and a method which obtains a precisely proportional cross-sectional representation from the entire community. To permit the one would seriously injure our jury system; to demand the other would set an impossibly absolute standard. It cannot be contended that the method of selection here used is an example of either extreme. The decision of the two courts below, that the system employed here falls on the permissible side of the critical line between the two extremes, is correct and should not be further reviewed.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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